IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr.Appeal No. 18 of 1993.

Judgment reserved on : October 1st, 2007.

Date of Decision: October 12th, 2007.

State of H. P. Appellant.

Versus

Roshan Lal. Respondent.

Coram

Hon'ble Mr. Justice Surjit Singh, J.

Hon'ble Mr. Justice Surinder Singh, J.

Whether approved for reporting[1]?Yes.

For the appellant : **Mr. S.D. Vasudeva, Addl. Advocate General with Mr. D.S. Nainta, Dy. Advocate General.**

For the respondent : **Mr. R.K. Gautam Senior Advocate, with Mr. Naveen Bhardwaj, Advocate.**

SURINDER SINGH, J.

The respondent was tried and acquitted for the offences punishable under Sections 302 and 458 of the Indian Penal Code by the Additional Sessions Judge in Sessions Trial No. 2 of 1990 decided on 8.9.1992 which has been assailed in this appeal.

Case of the prosecution.

Precisely, the case of the prosecution against the respondent has been that Bhangi Ram (deceased) aged about 65 years, brother of complainant Jangi Ram, was staying alone in his house at a distance of about one km, from the house of the complainant. The deceased was being looked after by his sister Parvatu (Pw) who used to visit him once or twice in a week. On 21-8-1989, at about 3.00 P.M, when Parvatu

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Whether reporters of the Local papers are allowed to see the judgment? Yes.

visited Bhangi Ram, she found Bhangi Ram murdered in his room. She immediately contacted her brother Jangi Ram and informed about the incident. Jangi Ram visited the spot and noticed that Bhangi Ram was lying dead adjacent to the room. The lock of the box, in the kitchen of the deceased was found broken. The complainant apprehended that some body had decamped with the money after killing Bhangi Ram. He informed the Police.

The police recorded the F.I.R Exhibit PA under Section 302 of the Indian Penal Code. The police visited the spot, prepared the site plan, took the photographs which are Exhibit P15 to P27, prepared the inquest report Exhibit PB and also lifted the finger prints. The police took into possession blood stained knife Ex.P-1 lying near the dead body, vide memo Ex. PF. A broken handle of wooden bat (Thapi) Ex.P-7, was taken into possession vide memo Ex. PJ along with the broken part Ex.P-2 vide separate memo (Ex.PJ) along with one blood stained Khandolu (Ex.P-3) vide memo Exhibit PG.

The dead body was sent for the post-mortem.

Dr. Sudha Sood conducted the autopsy. She found the following injuries on the person of the dead body:

1. One clean gaping incised wound on right ark which is 2.5 cm x 2 cm in size and its skin deep. It was 4” below the right shoulder joint.
2. One abrasion of 2.5 cm x 1 cm in size near the right ear on the temple region. It was 2 cm away from the right ear.
3. One clean lacerated wound right leg which is 2.5 cm x 1 cm into skin deep.
4. One contusion in occipital area which is 4 “ x 2” in size slightly towards left side from the midline. It is 5 inches

above the nake of neck. No mark of ligature was found on the neck.

On the examination of the stomach, about 200 CC of yellow colour almost digested liquid food was found with few *Chane Ki Dal* and granules. Bladder was empty. However, other organs were found normal. In the opinion of the Doctor, the time between the injury and death was probably 5 to 10 minutes and between death to postmortem was 6 to 18 hours. The post-mortem report is Ex.PD. In the opinion of the Doctor, the death had occurred probably because of shock due to the injury on the occipital region. The opinion regarding the cause of death given earlier, remained the same on the receipt of Chemical Examiner report Ex.PU/1. The alleged occurrence took place during the intervening night of 20 and 21.8.1989 and Police was informed in the evening. During the investigation of the case, on 23-8-1999 Pw Des Raj came to the house of Bhangi Ram where he met Investigating officer and made a statement that murder of Bhangi Ram was committed in his presence by the respondent. Thereafter, he appeared in the court of Judicial Magistrate and moved an application for recording his statement under Section 164 of the Code of Criminal Procedure which was recorded by the Judicial Magistrate.

On 24.8.1999, the respondent was arrested at about 10.20 a.m. The Police took into possession the shirt Exhibit P14 vide memo Exhibit PC, blood stained bed sheet Ext. P5 vide memo Exhibit PD, blood stained earth sealed in the container Ext P6 vide memo Ext. PE.

The bed sheet, shirt, blood stained earth, knife found on the spot were taken into possession. The shirt and the pant of the respondent were sent for serological examination. The bed sheet, shirt and earth which was found on the spot was stained with human blood, whereas, the blood stains on the other items were found disintegrated and their

origin cannot be determined and blood group also could not be ascertained. The police after recording the statements of the witnesses and on completion of the investigation, presented the challan in the Court.

Finding a prima facie case under Sections 302 and 458 of the Indian Penal Code, charges for committing murder and lurking house tress-pass during night by entering into the house of the deceased after having made preparation to commit the murder of Bhangi Ram were framed to which the respondent pleaded not guilty and claimed trial.

To prove its case, the prosecution has examined its witnesses and the respondent was also examined under Section 313 of the Code of Criminal Procedure. The circumstances which were attended upon him were put to him but denied. According to him, the witness Des Raj was inimically disposed towards him and the witnesses were under pressure of the Police. The respondent was called upon to enter into his defense as it was not a case for acquittal straightaway. However, no defense was led.

Findings of the trial court.

After appreciating the evidence on record and upon hearing the learned counsel for the parties, the trial Court acquitted the respondent as the it did not rely upon the statement of the alleged eye witness Des Raj (PW4) because he appeared to be closely associated with the respondent as per his version and was under police pressure to save his own skin. Learned trial Court also noticed some material discrepancies in the evidence of the prosecution. Accordingly gave the benefit of doubt to the respondent.

Contention in appeal

The State in the instant appeal has contended that the approach of the learned trial Court in appreciating the evidence was wrong and

further that the testimony of Des Raj, the alleged eye witness, was wrongly discarded. The minor contradictions were bound to occur owing to the lapse of time between the earlier statement and the statement recorded in the Court and further that it was wrongly held that there was no motive of the accused to kill Bhangi Ram.

Submissions before us:

We have heard Shri Som Dutt Vasudeva learned Additional Advocate General in detail. He has ventilated that even if Des Raj, the alleged eye witness is styled as accomplice, even then his testimony inspires confidence and stands corroborated in material particulars. Therefore, it was wrongly discarded by the learned trial Court. If it is properly appreciated, the judgment of acquittal can be converted into conviction.

Contra, Shri R.K. Gautam, learned Senior Advocate has pointed out the relevant pieces of evidence on record in order to show that the acquittal recorded by the learned trial Court is based upon the evidence on record. In nut shall, he supported the impugned judgment of acquittal.

Our findings.

We have given our thoughtful consideration to the rival contentions of the parties and have carefully scanned the evidence on record.

Shri Des Raj (PW4) at the relevant time was aged about 13 years and is the star witness of the alleged crime. The accused/ respondent was aged about 17 years. As per the testimony of Des Raj (PW4) aforesaid, he accompanied the respondent to the house of Bhangi Ram deceased on the night of 20.8.1989. He remained outside, the respondent entered the room of the deceased. He had seen the respondent killing Bhangi Ram in the moon light and also saw the respondent taking away certain articles which were hidden by him at a

distance from the house of Bhangi Ram. After three days of the alleged occurrence, he appeared before the Police on 23.8.1989 during the investigation of the case, in the house of Bhangi Ram (deceased) and made a statement to the police about the alleged incident thereafter, of his own, is alleged to have appeared before the Judicial Magistrate, Bilaspur for making his statement under Section 164 of the Code of Criminal Procedure. According to him, he was not guided or persuaded either by the Police or his father or any one else. He met his father at Bilaspur on his way to the Court and went directly to the court of Judicial Magistrate for recording his statement and no police officer was accompanying him. But his cross-examination requires a special attention wherein he has stated that two police officers (Thanedars) out of them one was the S.H.O. who had earlier recorded his statement, were present.

According to Shri P.R.Sharma, Judicial Magistrate, (PW) who recorded the statement of Des Raj aforesaid, he had put certain questions to him which were reduced into writing by him at the beginning to this effect and recorded a certificate Exhibit PR/1 on the original statement (Ext PR.) In the cross-examination, he had stated that application was moved by the witness but no police officer had accompanied him to his chamber. He stated that though his father was present in the chamber but at the time of recording the statement of Pw Des Raj, he was sent out. Des Raj after recording the statement was sent with his father being a child. We have carefully scrutinized the above evidence and have found that the statement of Des Raj aforesaid was not voluntary. From the record it appears that Desh Raj (PW) who was a boy of 13 years only was under constant surveillance and pressure of the Police who were surrounding him even at the time of recording his statement under Section 164 of the Code of Criminal

Procedure and his father was a persuasive force with Police to fix him to his statement at the time of examination during the trial. The Police had already recorded his statement under Section 161 Cr.P.C. on 23.8.1989, according to him, on the same day he appeared before the Magistrate to record his statement which is incorrect as his statement before the Magistrate was recorded on 26.8.1989. The respondent was already arrested on 23.8.1989.

So when he remained for three days, as per the case of the respondent-accused, the said witness was also a suspect in the case and was in police custody. Even Nikaru Ram (PW11) had stated that he had seen Des Raj twice in the Police Station when the respondent was arrested. In view of these circumstances, Des Raj PW appears to have bargained his theoretical freedom and during the trial, the fear of perjury might be booming large on his head and mind.

Further, Des Raj (PW4), has stated that right from 4.00 P.M. onwards on 20.3.1989, he was with the respondent. He had helped the respondent in his work at his place and thereafter he along with respondent went to his own home, around 7.00 P.M. On their way, they reached near village Chamyana, had their meals in the house of Chhabi Lal. After taking the meals at about 7.45 P.M., the respondent asked him to accompany him to the Dera of Guga which was organized in the house of Smt. Pushpa (Pw). Many people had gathered there. They stayed there for about 15 minutes. The respondent further asked him to accompany him towards the uphill side. They followed the route through the house of Lala Ram where Brij Lal brother of Lala Ram met them and asked about them. The respondent had replied that they were going to their home. When Desh Raj started crossing the ‘Langhana’, the respondent caught hold of him from behind and told him to follow the another way with him. Then they reached near the house of Bhangi Ram

deceased around 9.00 P.M. It was moon lit night. The house of Bhangi Ram was open. Respondent Roshan Lal went inside the room. After about two minutes, he heard the cries of Bhangi Ram, "*Doro Logo Maar Dia"*. On hearing this, he went nearer to the door and saw the respondent having a knife in his hand and an injury was already caused on his arm. Bhangi Ram got up from the cot and the knife fell down on the floor. The respondent took Thapani (wooden bat meant to wash clothes) and gave its blow on the back side of the deceased on his neck. Bhangi Ram fell down. Thapni broke into two pieces. The respondent rolled the bed sheet lying on the cot and pushed PW Des Raj outside and threatened him to kill if this incident was disclosed to any one. He got frightened. Again the respondent entered the other room, broke open the bolt of the door and then the lock of the wooden box, removed the articles, tied in the bed sheet and asked him to accompany. When they covered a short distance, the respondent dis-appeared for a while and returned after some time empty handed. Thereafter, they went to the Dera of Guga, in the house of Pushpa where both of them slept together. The respondent woke him up and asked him to accompany him. Then both of them went to his house of Chambi. The respondent left towards Slappar side and the witness returned to his home. In cross-examination he has made his statement quite doubtful. He has admitted that there were about 150 persons in the house of Pushpa at the time when they returned from the house of deceased Bhangi Ram. He did not make any complaint to any of the persons present there. When he reached his house in the morning at about 7.00 a.m., his parents were present in the house and they did not ask him where he stayed in the night nor did he tell anything to them about the occurrence. On 21 and 22.8.1989, he stayed in the home with his parents and on 22.8.1989, he heard in the village that Bhangi Ram was killed and he did not know that Police had

visited that place. Then next morning, he went himself to the house of Bhangi Ram in the village on 23.8.1989 where the police was also present. Thereafter he was brought to the Police Station in the after noon and on the same day, he had gone to make a statement before the Magistrate but according to the Judicial Magistrate aforesaid, the said witness had appeared before him only on 26.8.1989 and not on 23.8.1989. He has categorically stated that constable was accompanying him to the Police Station. It was his first visit in his life to the Court. Even he never appeared before the Panchayat. He did not ask his father if he should make the statement before the Judicial Magistrate and he had further stated that he belonged to agriculturist family. Though he came to the court along with his father but did not inform of his intention of making the statement in the Court even to his father. He has also contradicted himself. In view of the statement of the Judicial Magistrate (PW) that he met his father in the Court compound after making the statement whereas, the Judicial Magistrate had stated that his father had accompanied the witness in his chamber and before recording the statement of the witness, he was sent out. These material discrepancies and contradictions have left many questions un-answered. The witness belongs to agriculturist family who had not visited the Panchayat even once, went to the Police Station and Court alone to make the statement even without taking his parents into confidence. This story appears to be absolutely doubtful in the circumstances that at the time of recording his statement, the S.H.O. and other police officials were present out side the Court. Further, if he was so daring to make the statement, what prevented him not to disclose the matter in the house of Pushpa Devi where 100 to 150 persons were present in the Jagrata. After seeing such a ghastly crime, when he reached his house, why he did not disclose the incident to his parents and himself chose not to take them

into confidence and went to the hosue of deceased and offered himself as an eye witness to the Police and then went to the court. At that time where his fear had gone, is not understandable.

No doubt, the conviction can be sustained on the basis of the sole testimony of an eye witness but it should be found to be cogent and trust worthy. In the circumstances narrated above, the testimony of the alleged sole eye witness appears to be false or surrounded by suspicious circumstances.

Further, the alleged disclosure statement made in the presence of Nikaru Ram (PW11) and Prem Lal under Section 27 of the Indian Evidence Act pursuant to which the recoveries of certain articles were recovered also does not inspire confidence. The said witness Nikaru Ram is alleged to have signed the disclosure statement as a witness in the house of Babu Ram and he did not accompany the accused to the place of recovery. He had stated in the Court that his statement was obtained by the Police after affecting the recovery whereas, the another witness Prem Chand was not examined. Further, Pw Parwatu has deposed that the articles of the alleged recovery were handed over by her to the Police in the house of Bhangi Ram deceased which completely destroys the prosecution case on the point of recovery.

Learned trial Court has observed all the above facts and also took note of the time given in the post mortem report which did not corroborate the time of the death. The alleged motive of the crime attributed to the respondent also not even remotely fit to the present state of circumstances. Admittedly, the deceased was the uncle of the respondent. In any case if he wanted to finish him for the motive, as alleged, he would not have created any evidence in the form of PW4 against himself. Thus no reliance can be placed on the testimony of Desh Raj aforesaid to sustain the conviction of the respondent. It is a

settled law that by filing the appeal against acquittal, the innocence of the accused does not get diluted. It is also equally settled that where two views are deducible from the evidence one towards his guilt and another towards his innocence, the benefit of favourable view shall have to be given in favour of the accused.

On legal scrutiny of the evidence of the prosecution on record, in our considered opinion, the testimony of PW4 Des Raj does not inspire confidence. The learned trial Court has rightly discarded the testimony of the alleged eye witness. The findings for acquittal are born out from the record. Accordingly, we do not find anything worth interference in the appeal, as such the appeal is dismissed. The respondent is discharged of his bail bonds, entered upon by them at any stage during the proceedings of this case. The matter stands accordingly disposed of.

(Surjit Singh)
Judge.

(Surinder Singh)
Judge.

October 12th, 2007.
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